UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

GOYA FOODS OF FLORIDA

And **CASES**
12-CA-21464
UNITE! (UNION OF NEEDLETRADES, INDUSTRIAL, AND TEXTILE EMPLOYEES, AFL-CIO/CLC) **12-CA-21659**

Marcia Valenzuela Esq., and
Jennifer Burgess-Solomon Esq.,
Counsels for the General Counsel
James C. Crosland Esq., and
David C. Miller Esq., Counsel for
Respondent
Ira J. Katz Esq., Counsel for the Union

DECISION

Statement of the Case

Raymond P. Green, Administrative Law Judge. I heard this matter on November 8, 9 and 13th 2001. The charges and amended charges were filed on April 9, April 27, May 30, July 11 and August 31, 2001. The Consolidated Complaint was issued on September 25, 2001. In substance, the Complaint alleges as follows:

1. That the Union was certified in Case No. 12-RC-8266 on October 26, 1998 as the collective bargaining representative of the employees in the following described unit. (The petition in that case was filed on September 2, 1998)

> All full-time and regular part-time drivers, forklift operators, production, maintenance and warehouse employees, employed by the Employer at its facility located at 1900 NW 92 Avenue, Miami, Florida 33172; excluding all other employees, employees employed by outside agencies and other contractors, office clerical employees, managerial employees, guards and supervisors as defined in the Act.

2. That on or about April 2, 2001, the Respondent unilaterally changed employee terms and conditions of employment by requiring all drivers to submit to new inspection procedures upon completion of their routes, including the signing a document acknowledging the quantity of returned merchandise in their vehicles.

3. That in or about May 2001, the Respondent unilaterally changed employee terms and

conditions of employment by instituting a change in the assignment of routes to employees.

4. That on or about April 4, 2001, the Respondent for discriminatory reasons, discharged Rodolfo Chavez.

Thereafter, on February 12, 2004, I issued an Order approving the withdrawal of certain allegations contained in 12-CA-21464 because the parties had entered into a non-Board settlement agreement. The withdrawn allegation related to the discharge of Rodolfo Chavez.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I hereby make the following findings and conclusions.

Findings and Conclusions

I. Jurisdiction

It is admitted that the Respondent is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II Alleged Unfair Labor Practices

(a) Background

The Respondent markets prepared foods primarily for the Hispanic market in the United States and abroad. It is an integrated enterprise, making the cans it uses, preparing the foods it sells and delivering these to markets ranging in size from small grocery stores to large supermarkets.

The Union began its organizing efforts at Goya in 1998 and this ultimately led to the Union's certification by the Board after an election held on October 26, 1998.

After a period of bargaining, the Respondent withdrew recognition on December 20, 1999.

At some point, the Union filed a series of charges against the Company. These charges resulted in a Complaint, which was heard by Administrative Law Judge, Lawrence W. Cullen in June 2000. The lead case number of that matter is 12-CA-19668, and Judge Cullen issued his recommended Decision and Order on February 21, 2000. That decision, which held, *inter alia*, that the Company had unlawfully withdrawn recognition, was appealed to the Board.

At the time of this hearing, the parties agreed that I should defer a Decision in this case until the Board issued a decision in the Cullen case. But after waiting for almost three years, it occurred to me that perhaps the parties might have changed their minds. As it turns out, the Respondent still wants me to wait, whereas the General Counsel wants me to issue a decision. Obviously, I have decided to agree with the General Counsel.

(b) Alleged Unilateral Change regarding Return Inspections

The General Counsel and the Union contend that this change affected the employees' terms and conditions of employment were not minimal and therefore required the Company to give notice to and bargain with the Union before making the change. The Company contends that the change was de minimus and that it was enacted without consultation with the Union because of exigent circumstances.

Goya delivers its merchandise to stores and supermarkets utilizing 28, 40 and 45-foot tractor-trailers driven either by its own drivers or contract drivers. The direct drivers are employees encompassed by the certified collective bargaining unit whereas the contract drivers, who the parties have considered to be independent contractors, were excluded from the bargaining unit.

Each truck has either a freezer or a separate refrigerator compartment for frozen goods.

Deliveries are made directly to individual stores and supermarkets as opposed to a system of delivery to supermarket central warehouses. This system, called "direct store delivery" (or D.S.D.), has the advantage of targeting individual stores, (and their local customers), and therefore, the Respondent has been able to sell a wider variety of goods than otherwise might be the case. On the other hand, the disadvantage of this system is that it is more labor intensive and requires more drivers. The Respondent has determined that the advantages outweigh the disadvantages.

Drivers typically deliver merchandise to a number of customers during a single trip per day. When they return to Goya's facility, drivers may come back with two types of merchandise; "credited merchandise" or "refused merchandise." Credited merchandise is goods that had previously been delivered to a store and their return to Goya has been pre-approved. In such cases, the driver, before leaving Goya to make deliveries, is issued a credit memo describing the goods to be returned. Upon a driver's return to the Respondent's facility, credited merchandise is off loaded and accounted for at a location within the facility known as the credit tent.

Returned merchandise involves goods that are refused by a store for one reason or another. (They can be damaged goods or goods that have not been ordered). Prior to April 2, the drivers returned with these kinds of goods at the end of the day, but they were left on the truck after it was parked and the goods were not accounted for until later in the evening after the driver usually went home. They were not accounted for at the credit tent and there was a hiatus between the time the truck entered the facility and the time the returned goods were accounted for.

In early 2001, a theft problem arose involving returned merchandise. That is, it became apparent to the Company that some of the goods that were supposed to be returned to the warehouse, (as returned merchandise), never showed up when the accounting procedure took place in the evening. This was brought to the attention of the police who conducted an investigation and this ultimately resulted in the arrest of a contract driver who confessed that he appropriated to himself, returned merchandise.

The Company's witnesses testified that in order to prevent these kind of thefts in the future, they decided to slightly alter the return procedure so that both credited merchandise and return merchandise would be off loaded and accounted for at the time that the truck driver returned from his route. This change involved having a person assigned to the credit tent who would, in addition to dealing with the credited merchandise, physically inspect the inside of the truck, including the freezer compartment, to verify what if any returned merchandise was being brought back to the warehouse.

Company witnesses acknowledges that it did not notify the Union about this change in procedure and state that one reason was that they wanted to see if they could catch any other drivers who might be stealing goods. (They didn't). In any event, the procedure went into effect on April 2, 2001, and a warehouse employee named Torres, was assigned to be at the credit tent during the period when trucks returned.

The only real difference between the return procedure before and after April 2, insofar as the drivers were concerned, is that upon their return to the terminal, they were required to spend a few more minutes at the credit tent while Torres inspected the inside of the trucks and counted the returned merchandise. Other than that, there was no other change in procedure and the change, in my opinion, was de-minimus. *Civil Service Employees Union*, 311 NLRB No. 6, (I note that the return of credited merchandise is a normal occurrence, whereas the return of "return" merchandise is a great deal more infrequent).

(c) Alleged Unilateral Change in Routes

The Company delivers its products to supermarkets and smaller markets from its Miami facility throughout the greater Miami area. The geographic area serviced by Goya's drivers runs about 300 miles from north to south and about 100 miles from east to west.

To make deliveries, the Company employs a group of drivers whom it directly employs. The Company also utilizes the services of another group of drivers who are designated as agency drivers. This latter group was not included in the collective bargaining unit and were considered by the Company and the Union to be independent contractors.

The routing of deliveries is akin to the traveling salesman problem in mathematics. That is, how do you design the shortest or fastest routes given the multiplicity of variables that go into this problem? To solve the problem, one must consider the number of drivers available on any given day, the number of customers to which deliveries must be made on that day, the periods of time that particular customers will accept deliveries, [1] the amount of goods to be delivered to each customer on any particular day and the distance, or more importantly given traffic conditions, the time that drivers normally take to go from one location to the next.

The General Counsel asserts that the employee drivers prior to the May 2001 had fixed routes. The implication here is that each driver had some kind of quasi-equitable interest in the

[1] Some customers, particularly bigger ones, accept deliveries only at specified times. Accordingly, the route must take this into account.

routes. But this I think is not the case. While it is certainly true that routes tended to become somewhat "fixed" because of custom and usage, changes did occur from time to time as old drivers left, new drivers were hired, or as customers either came or left or changed their patterns of ordering.

Before May 2001, the function of figuring out each day's deliveries was accomplished by trip planners who worked in the traffic department. These people, using their knowledge of where the stores were located and the deliveries scheduled, made decisions each night as to where, when and by whom the deliveries were to made on the following day. Of course, there was a historically established pattern for the trips so that the trip planners did not have to reinvent the wheel each night. But they did have to deal with changes that came up in the normal course of events, such as drivers being out sick etc.

In or about 1990, the Company began to explore the possibility of using a software program called "Roadnet" to assist in the making of routes. This is a program sold by a division or subsidiary of UPS and was utilized at a small number of the Company's locations in 1992. At that time, the program was not so sophisticated and it is not clear to me how much success the Company had with its use at that time.

In any event, in 1998, and before the Union arrived on the scene, the Company entered into a contract to license Roadnet with the intent of implementing the program at all of its locations including the location in Miami, Florida. In Miami, it was implemented in May 2001. There is no dispute that the Company did not notify or offer to bargain with the Union prior to its implementation.

Roadnet is essentially an expert software program used as a tool to route vehicles within the geographic area where the customers are located. To solve the traveling salesman problem, a database is created containing, *inter alia*, the names and addresses of each customer and the times when customers accept deliveries. Essentially, it constructs a map showing the location of each customer, the distances from each other and the frequency of deliveries to each. Given the number of trucks available, (both driven by company drivers and agency drivers), and inputting each day's scheduled deliveries, the program will give a preliminary solution each evening to the traveling salesman problem; that is, what trucks are to go where on the following day. This is essentially an information tool used by traffic people to set up each day's trip schedule and in a sense creates an objective body of information to supplement each trip planner's accumulated experience and intuition.

One consequence of the software program's implementation was to eliminate at least one non-unit job in the traffic department. Also, it allowed trips to be scheduled earlier in the day. Another consequence was that a number of the outlying routes could be consolidated so that the Company could use fewer non-unit agency drivers and trucks to make the same number of deliveries per day. The Company's employee drivers were normally assigned to more densely populated areas, which were closer to Goya's terminal.

Although less affected than agency drivers, it could be argued that the institution of the Roadnet program resulted in some change in the routes of the bargaining unit drivers. That is, as a result of increased efficiencies in trip planning, the number of deliveries, on average, that each driver made each day went up and that the amount of time spent on the road also went up. This

resulted in both more equalization of pay amongst the employee-drivers and, on average, more money for them all.

The Company argues that Roadnet should be considered to be merely a tool, similar in nature to a decision to buy and use a new and more efficient type of drill press. The Company argues that Roadnet simply takes information already in existence, (but inside the trip planners' heads), and constructs a map to more quickly and efficiently design the day's deliveries. In this respect, the Company contends that the use of Roadnet therefore was not a material change.

The Company also argues that the implementation of Roadnet, although concededly having the impact of reducing employment for non-unit employees, had little if any impact on employees within the bargaining unit. Indeed, the Company contends that if anything, the impact was favorable to the bargaining unit employees as a whole, inasmuch as the use of Roadnet equalized their work and resulted in higher income to the unit drivers in almost all cases.

The problem with the Company's argument is that the income of the employee-drivers was directly tied to the amount of deliveries each person makes each day. That is, they get commissions based on deliveries and so their wages are directly impacted by the amount of deliveries they are assigned to make. Thus, the mapping of delivery routes is directly related to the drivers' incomes simply because of the method by which they are paid. The implementation of Roadnet may have been beneficial to the employee drivers in terms of equalization of pay and even in increasing their pay because of the elimination of some agency drivers. But there is no question that the implementation of Roadnet, for better, (higher income), or worse, (longer hours), had a direct and substantial impact on bargaining unit employee wages and hours. [2]

One might argue whether the impact of the change was good or bad, or how big it was. But that is largely beside the point. [3] If a change in company practice or procedure has, as it does in this case, a direct and not immaterial affect on employee wages, hours and working conditions, then a Company, having a bargaining relationship with a Union, is required to bargain about the change. As this was not undertaken, it is my conclusion that the Company, in this respect, has violated Section 8(a)(5) of the Act. [4]

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[2] It could be argued that one of the impacts that the roadnet system had on the drivers was to eliminate any possibility of favoritism that might have been shown by dispatchers to particular drivers in the assignment of routes.

[3] The fact that a unilateral change may be favorable toward employees is of no consequence so long as it has an impact on bargaining unit employees. The issue is not whether the change is a grant of a benefit designed to influence employees as to whether to support a union, but rather whether the Company breached its obligation to bargain with a Union before making such changes. *NLRB v. Katz*, 369 U.S. 736 (1962), *NLRB v. Crompton-Highland Mills*, 337 U.S. 217 (1949).

[4] Unlike the situation involving the minimal delays caused by the implementation of the new verification procedure, the implementation of the roadnet system had a dramatic impact on at least some of the drivers' incomes. This was shown by Respondent Exhibit 7 which shows as follows:

Name	Commissions 6/4/00-10/01/00	Commissions 6/3/01-9/30/01	Increase/Decrease

Continued

(d) Unilateral Disbursement of Stores to which Chavez made deliveries

The General Counsel contends that when the Company discharged Chavez it had an obligation to bargain with the Union about the reassignment of the stores on his route to the other drivers. (The Company did not hire a replacement). I do not agree.

When a company fires an employee for cause, and assuming that the employee is doing work required by the enterprise, it has to either hire someone else or reassign his or her work to the remaining employees on staff. This does not, to my mind, constitute a unilateral change but simply a continuation of the normal course of doing business, inherent to any enterprise. To suggest that an enterprise must first bargain with a Union about the immediate need to reassign that person's work every time it discharges someone, would be to impose a duty that would infringe upon and tend to impede the normal operations of any enterprise. For example, for how long would a company be required to bargain before reaching an impasse before it could hire a replacement or reassign required work to someone else? [5]

Conclusions of Law

l. Goya Foods of Florida, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Union of Needletrades, Industrial, and Textile Employees, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

Eduardo Arhello	5258	6313	1055
Pablo Brito	4944	5721	777
Antonio Castro	2658	7321	4692
Isain Navarro	7962	8498	536
Reinol Orta	4584	4944	360
Alfredo Reyes	3941	4694	752
Antonio Rodriguez	5042	6933	1891
Vladmir Romero	6313	7850	1537
Miguel Then	5007	6468	1461
Orlando Torrens	4653	6106	1453
Juan Valdes	3981	4330	348
Pedro Varela	5132	5043	(89)
Llamil Yema	6195	6766	571

[5] This is not to suggest that a company would not be required to bargain about a grievance raised, after the fact even in the absence of a contractual grievance procedure, with respect to the discharge of an employee. When I say that Chavez was fired for cause, I do not mean to imply that the decision was for good or bad cause. What I mean is that his separation was not the result of economic considerations. Unlike a discharge prompted by an employee's conduct, the onset of economic factors that may cause a layoff are much more gradual and are therefore more amenable to prior notice and bargaining. In that situation, an employer and union may arrive at a number of solutions to an economic downturn in lieu of layoffs; for example a reduction in hours for all employees.

3. At all times material herein, the Union has been the exclusive representative of certain employees of the Respondent in a unit appropriate for the purposes of collective bargaining (as described above), within the meaning of Section 9(a) of the Act.

4. By unilaterally changing driver routes and thereby changing their hours and wages, at the Miami, Florida facility, the Respondent has violated Section 8(a)(1) & (5) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

I will not recommend that the Respondent eliminate the use of the Roadnet software program and return to its former way of making the daily routes. Such a remedy would, in my opinion, be burdensome and impose a degree of inefficiency in the Company's operations that I do not think is required by the nature of the violation found herein. Nor can I recommend that any backpay be paid to any of the employees in the bargaining unit, inasmuch as the evidence does not show that there was any monetary detriment to them as a consequence of the change.

On the other hand, it is my opinion, that the Respondent should bargain in good faith with the Union about the effects of this change and if agreement is reached embody such agreement in a written document.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [6]

ORDER

The Respondent, Goya Foods of Florida, its officers, agents, successors, and assigns, shall

Cease and desist from

(a) Refusing to bargain by failing to notify and offer to bargain with the Union regarding the change in procedures for determining routes and by unilaterally changing employees' wages and hours of work.

(b) In any like or related manner interfering with, restraining or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, bargain with the Union regarding the May 2001, change in route procedures.

(b) Within 14 days after service by the Region, post at its facility in Miami, Florida,

[6] If no exceptions are filed as provided by Sec. l02.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. l02.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

copies of the attached notice marked "Appendix." [6] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C.

_____
Raymond P. Green
Administrative Law Judge

[6] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix A

Pursuant to the unopposed Motion of the Respondent, the following transcript changes are made.

Page	Line	Correction
6	12	Change “Sear” to “Seaview”
9	2	Change “van” to “man”
11	19	Change “Luiz” to “Luis”
14	7	Change Judge Green to Ms. Burgess-Solomon
18	8	Change “serving” to “reading”
21	20	Delete “hard stop”
27	4	Change 883 and 885 to 8(a)(3) and 8(a)(5)
27	25	Change 885 to 8(a)(5)
28	18	Change 885 to 8(a)(5)
29	14	Change 885, but also 883 to 8(a)(3), but also 8(a)(5)
34	17	Change “identity” to “identify”
39	16	Change “represented to “representative”
45	10-11	Change “Vigoberto Arcay, Herlando Arbrayo, Gerry Dias” to “Rigoberto Arce, Rolando Abreu, Jerry Diaz”
74	12	Change Tonny Diaz to Tony Diaz De Villegas
74	23	Change Tony De Villegas to Tony Diaz De Villegas
82	7	Change 883 to 8(a)(3)
110	5	Change “geography” to “geographically”
112	3	Change “they geo-cding” to “they call geo-coding”
166	23	Change “scraped” to “scrapped”
195	7	Change “effects” to “affects”
197	10	Changed “marked” to “market”
199	22	Change “no” to “the”
199	25	Change “no” to “the”
206	12	Change “Urena” to “Llerena”
206	13	Change “Cuba Urena” to “Kuiver Lllerena”
215	9	Change “exactly they” to “exactly what they”
268	17-18	Change “priority consistent” to “prior inconsistent”
280	17	Change “Brios” to “Abreu”
290	4	Change “chart” to “charge”
291	25	Change “no” to “new”
305	4	Change “the, if” to “the statements, if”
315	9	Change “weekends” to “weeks”
387	16	Change 885 to 8(a)(5)
445	3	Change “see” to “receive”
449	15	Change “Freddy” to “F”
453	5	Change “CS” to “Sies”
486	11	Change “didn’t why” to “didn’t know why”
488	23	Change Mr. Miller to Ms. Valenzuela
509	6	Change 883 to 8(a)(3)
514	8	Change 883 to 8(a)(3)

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.
To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with UNITE by failing to notify and offer to bargain with it regarding the change in procedures for determining routes and by unilaterally changing employees' wages and hours of work.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, and upon request by the Union, offer to bargain with it regarding the above described issues.

Goya Foods of Florida

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board 51 SW 1st Ave. Room 1320 Miami, Florida 33130-1608. Telephone 813 228 2662. Hours: 9 a.m. to 5:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER 718-330-2862.